FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. 108

ANTHONY JOSEPH ACCARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

STANFORD CLINTON,
134 North LaSalle Street,
Chicago 2, Illinois,

MAURICE J. WALSH,
105 West Adams Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	4
Reasons for Granting the Writ	11
Conclusion	24
Appendix—Judgment Order Below	25

TABLE OF CASES.

Bayless v. Johnston, Warden, 48 F. Supp. 758, 760	20
Johnson v. Zerbst, 304 U. S. 458, 467, 468	19
Pugh v. United States, 9 Cir., 212 F. 2d 761, 764	20
Stack v. Boyle, 342 U. S. 1, 12	23
Sutton v. United States, 5 Cir., 157 F. 2d 661, 663, 670	20
United States v. Reynolds, 345 U. S. 1, 7	18
United States Constitution and Statutes:	
Constitution of the United States, Sixth Amendment	18
5 U. S. C. 310	13
18 U. S. C. 1621	12
18 U. S. C. 1905	17
26 U. S. C. 7122	15
26 U. S. C. 7206(1)	21
26 U. S. C. 7207	21, 22
26 U. S. C. 7213	17
Federal Rules of Criminal Procedure, Rule 7(c)	18, 19
Federal Rules of Criminal Procedure, Rule 8	22

PUBLICATIONS AND TEXTS.

Almanac of Liberty, Justice William O. Douglas (Doubleday & Co., 1954), Page 148	21

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959.

No. .....

ANTHONY JOSEPH ACCARDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Anthony Joseph Accardo, prays that a writ of certiorari be issued to review the decision and judgment order of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The orders of the United States District Court for the Northern District of Illinois, Eastern Division, denying the petitioner's motion to dismiss the indictment, based in part upon matters in bar of the indictment and in part upon substantial defects appearing on the face of the in-

dictment, and from the order fixing the trial date as September 12, 1960, and from the order denying inspection of the grand jury minutes and testimony by the court or the defendant, were entered on July 12, 1960, and were not reported. No opinion was filed.

The order of the United States Court of Appeals for the Seventh Circuit, dismissing the appeal, was filed on August 25, 1960, and is not reported, but is set forth in the appendix hereto, and in the certified record transmitted herewith.

JURISDICTION.

This petition is filed within thirty days of the dismissal of the appeal in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Is not the dismissal of an appeal for lack of jurisdiction erroneous, where the court of appeals has failed to consider the real, legal and practical final effect of the decision of the court below upon the rights involved, even though the orders appealed from are in criminal cases and are not "sentences"?

2. Has not a defendant been finally and irreparably aggrieved and damaged by a "decision" expressed in an order which refuses exploration of the grand jury minutes of a "Special Grand Jury" where the evidence, apparent upon the face of the record, and presented in court by testimony and exhibits, clearly shows that the "Special Grand Jury" was prejudiced and biased against the defendant from the date of its empanelment to the date of the return of the indictment some sixteen months later; and which was the only indictment returned by the said

"Special Grand Jury," which was biased and prejudiced against the defendant by Special Prosecutors, acting without valid authority?

3. Where a district court, upon no more than an oral motion by an assistant United States attorney, enters an order quashing *subpoena duces tecum* addressed, respectively, to a United States Attorney and an assistant regional counsel for the Internal Revenue Service, for documents in their possession, and intended by the defendant for use as evidence in support of his motion to dismiss the indictment, and examination of such witnesses, concerning their possession of such documents, is denied by the trial court, has not the defendant been effectively and finally denied his right to process and his right to present adequately the pleas in bar included in his motion to dismiss?

4. Where a decision has the effect of compelling a long trial, involving great adverse publicity to the defendant, and mutually great expense to the government and the defendant, and it is obvious upon the face of the indictment that it is invalid, and will not sustain conviction because it definitely charges more than one offense in each count, and because it falsely alleges that it has attached thereto a true and correct copy of the defendant's income tax return, although there is obvious omission of the W-2 Form which was attached thereto on filing, has not the trial court effectively made a final decision on substantial rights which terminates, for all practical purposes, this phase of the litigation?

5. Where an indictment contains a patently false allegation concerning the exhibits attached thereto, and upon its face is so vague and uncertain and so prejudicially duplicitous in each of its three counts as to fail to constitute a charge, is the denial of a motion to dismiss not a

final decision and judgment which requires a determination upon appeal of whether the trial court has an indictment or charge sufficient to sustain its jurisdiction for trial?

STATEMENT OF THE CASE.

The indictment herein contains three counts, each charging that the defendant made, subscribed *and* filed a tax return containing misstatements regarding his automobile expense deductions. The indictment was returned April 25, 1960, and the charges therein were made by a "Special Grand Jury" and is the only indictment it returned, other than one against an alleged recalcitrant witness, which has been dismissed.

The following is a statement of events leading up to the indictment and ensuing action with relation thereto.

1. On December 15, 1958, Richard B. Ogilvie filed an affidavit under a cause without a number in the United States District Court for the Northern District of Illinois, entitled "*United States of America* v. *John Doe, Richard Roe, et al.*, Defendants," in which he stated that he had been appointed a "Special Assistant to the Attorney General of the United States" by Deputy Attorney General Lawrence E. Walsh, and that he was directed to assist in an investigation "now pending before the Grand Jury of the United States District Court for the Northern District of Illinois," (all under the date of December 15, 1958). The affidavit further stated that the public filing and publication of the letter of authority and oath of office would impede "the above mentioned investigation" and would be contrary to the best interests of the United States and therefore requested that the Clerk of the Court be directed to impound the letter of authority and oath of office until such time as the investigation shall be concluded.

Under the date of December 15, 1958, United States District Judge Michael L. Igoe, in an *ex parte* hearing, apparently not in open Court, a transcript of which is not available, ordered that the Clerk seal and impound the letter of authority to and the oath of office by Special Assistant to the Attorney General, Richard B. Ogilvie. (Certified copies of said letter of authority, and oath of office, are included in the record, Gov. Exhibits 1 and 2.)

2. On January 9, 1959, R. Tieken, United States Attorney for the Northern District of Illinois, appeared *ex parte* before Judge Michael L. Igoe, and filed a petition stating, "Petitioner represents to the Court that the public interest requires the summoning of the aforesaid Special Grand Jury." With no further showing, allegation nor evidence, the Court thereupon ordered the public drawing of the names of forty-five (45) persons and the issuance of summons to them returnable January 26, 1959, for the purpose of selecting a "Special" Grand Jury for the Northern District of Illinois for the January 1959 Term.

3. That at the time the said "Special" Grand Jury herein was selected, there were then in existence at least twelve (12) other Grand Juries for the Northern District of Illinois, which had been regularly empaneled at the terms of which they commenced, and had not expired by law or order of Court, and were available for presentation of evidence for the conduct of investigation.

4. That on January 26, 1959, District Judge Michael L. Igoe did empanel a so-called "Special" Grand Jury, and did instruct said Grand Jury that it was a "Special" Grand Jury for the purpose of conducting a special investigation at the direction of and in cooperation with *Special* Assistant to the Attorney General Ogilvie and Special Assistant Carey. Under the date-line of January 27, 1959, Chicago newspapers carried substantial publicity relating

to the empanelment of this Special Grand Jury quoting Ogilvie and its intent and the breadth of the investigation. In the Chicago Daily Sun-Times there appeared an article which is included as an exhibit herein and was presented to the Court below in support of the motion to dismiss the indictment. An article under the date-line of January 27, 1959, showed a posed photograph of Ogilvie and Carey in the United States Court House, which article stated that the first witness before the "Special" Grand Jury would be called on or about February 11 and would probably be Anthony Joseph Accardo. (Deft's. Exhibit 4.) On February 11, 1959, Anthony Joseph Accardo was called as a witness before the "Special" Grand Jury by the *Special* Prosecutors and he was examined before said "Special" Grand Jury, but not concerning the subject matter of the indictment in the case at bar. Accardo was not excused as a witness at the end of his testimony, but was required to promise that he would appear upon notice of the Prosecutors' desire to be given by telephone. Accardo was never recalled by the "Special" Grand Jury. Accardo's original appearance before the "Special" Grand Jury was secured under an oral agreement between a former attorney and Ogilvie by telephone conversation. (See the testimony of Prosecutor Ogilvie before the trial Judge on the motion to dismiss appeal, Pages 232-239 of Transcript.)

5. In the eighteen (18) months that elapsed between January 26, 1959, and July 26, 1960, the date of its legal expiration under the Federal Rules of Criminal Procedure, Rule 6(g), this "Special" Grand Jury returned only one indictment, with one exception, against any person, and that is the indictment against the defendant herein. (The exception is an indictment that was returned against a recalcitrant witness charging perjury. This indictment has been dismissed because the witness-defendant is deceased.)

6. On April 25, 1960, the indictment in the case at bar was filed, consisting of three counts and naming only one defendant, Anthony Joseph Accardo. While the pleading claimed to allege a violation under Section 7206(1) of Title 26, U. S. C., the facts alleged in the indictment, to-wit, that the defendant made and subscribed *and* filed a personal income tax return which was not true in all material respects, obviously purport to charge two different offenses carrying two different punishments, one a felony and one a misdemeanor. Section 7206(1), Title 26, U. S. C., punishes the signing of a document containing false material matters as a felony. Section 7207, Title 26, U. S. C., punishes the *filing of* such a return as a misdemeanor.

Of course, Section 7201 punishes any wilful attempt to evade or defeat income tax as a felony.

7. On May 6, 1960, the indictment in the Court below under cause number 60 CR 189 was set for arraignment, at which time the defendant, by his counsel, asked that the arraignment be continued pending the filing of motions, but the Court denied this request and required the entry of a plea, whereupon the defendant entered a plea of not guilty. The Court stated that it would allow the filing of any motions by July 6, 1960, and that the entry of the plea would be without prejudice to motions in the nature of pleas in bar.

On July 1, 1960, counsel for the parties appeared before the District Judge and the defendant was permitted to file the appearance of an additional attorney but was denied an additional ten days for the filing of motions, although the Special Prosecutor had stated to counsel before presentation of the request that he would have no opposition to said request. The Court summarily denied the request without hearing from the Special Prosecutor.

8. On July 6, 1960, the defendant filed a motion to

dismiss the indictment stating some thirteen (13) grounds together with a brief in support thereof. A copy of said motion is in the record certified to this Court.

In the course of the hearing upon the motion, two additional points developed and were urged upon the Court, and ruled upon by him adversely to the defendant. These were:

(1) That it was apparent upon the face of the indictment and under the law that the income tax returns attached to the indictment as exhibits were not true and correct, as alleged in the indictment, because it was obvious that there had been detached from them the W-2 forms or schedules consisting of a statement by the defendant's employer of the amount of salary paid to the defendant and of the amounts withheld by the employer from the defendant and paid to the Government on account of his income taxes and social security obligations. (See face of tax returns attached as exhibits to indictment.)

(2) That the statement "I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return", which appears immediately above the lines for taxpayers signatures on Form 1040 Individual Income Tax Return, is misleading and confusing and when considered with Section 7206(1) of Title 26, U. S. C., indicates that a taxpayer cannot determine what statute he violates or what penalty he incurs or what form of prosecution to which he is subject and, therefore, the taxpayer is denied due process of law as guaranteed by the Constitution.

9. The defendant further moved the Court at the presentation of evidence that the Court examine the Minutes of the "Special" Grand Jury in camera and make them available for the examination of the defendant for use in

support of his motion to dismiss, and attempts to show the prejudice of the "Special" Grand Jury.

10. The defendant, prior to the hearing on the motions, caused the service of subpoenas *duces tecum* asking for records and documents concerning procedures and concerning matters relevant and evidentiary to the issues in the hearing. Upon oral representation by an Assistant United States Attorney, without written statement of opposition or proper claim of the governmental privilege under statute and regulation against disclosing subpoenas *duces tecum*, and upon examination of the two witnesses, R. Tieken, United States Attorney, and Joseph King, Assistant Regional Counsel for the Bureau of Internal Revenue, refused to permit any examination concerning these documents, and the defendant thereby contended that he was denied compulsory process in his behalf as provided for by the Sixth Amendment to the Constitution of the United States. (Tr. 33, 35, 179, 180, 189.)

11. All motions of the defendant, without exception, were denied, and the Court having heard argument and evidence upon these motions permitting the issues to be formed by the Government's responsive brief and affidavits, all during a period when the trial Judge was sitting as an emergency Judge for the hearing of emergency matters during the summer recess of the United States District Court for the Northern District of Illinois, summarily and without hearing the objections and reasons of the parties, set the cause for trial on September 12, 1960, thus giving a substantial preference over many pending criminal causes in the United States District Court, and upon a date simultaneous with an income tax cause theretofore set by the same Judge for trial before him, and which cause counsel for the parties therein have stated will occupy about two weeks.

The Special Prosecutor in the case at bar has indicated to counsel that a trial in the case at bar will probably take four weeks.

12. The appeal was from the denial of the motion to dismiss the indictment as being invalid and improper for the reasons stated in the motion; and because the indictment is insufficient and unlawful upon its face. Implicit is the order by the trial Court quashing subpoenas *duces tecum* addressed to R. Tieken, United States Attorney, and Joseph King, Assistant Regional Counsel for the Bureau of Internal Revenue, thereby denying to the defendant compulsory process to secure evidence in support of his pleas in bar, presented by the motion to dismiss.

The defendant further appealed from the final decision of the Court wherein it refused to examine the Minutes of the "Special" Grand Jury in camera, and refused to make them available to the defendant for the purpose of determining the prejudice of the "Special" Grand Jury, an issue presented by the pleas in bar contained in the motion to dismiss, and by the evidence.

The defendant further appealed from the final decision of the trial Court in setting arbitrarily and with inordinate haste a trial date of September 12, 1960, which affords to the defendant completely inadequate time to prepare a defense properly requiring more than 100 witnesses and investigation of more than 200 possible Government witnesses, in a case which required the almost exclusive efforts of a "Special" Grand Jury, two Special Prosecutors, and more than five investigators for about 15 months; and which trial date, September 12, 1960, will subject the defendant to the loss of his right to a fair trial by reason of great publicity occurring at about the time of the commencement of the Fall election campaigns, whereby this prosecution will undoubtedly become the subject of comment by politi-

cal candidates and orators, which comment will unduly prejudice the defendant both before and during a trial had and commenced on September 12, 1960.

On August 25, 1960 the United States Court of Appeals for the Seventh Circuit granted the motion to dismiss the appeal filed by the Government on the ground that there was no final decision or judgment appealed from.

REASONS FOR GRANTING THE WRIT.

This Honorable Court should exercise its jurisdiction in this case for the following reasons:

1. The conduct of the hearing by the trial court, at the conclusion of which it entered the orders appealed from, indicated an intention to compel trial, regardless of the merits of the defendant's motion to dismiss, either insofar as the matters set up in bar of the indictment or insofar as plain and apparent insufficiency of the indictment to sustain conviction were concerned, and its decision on the motion constituted a final determination of the rights of the defendant with regard to the motion, and the parties should be granted a final determination of their rights by appeal, before being compelled to engage in a long, expensive trial.

2. Modern increased expense and hardship imposed upon parties through obviously long and highly publicized jury trials, for the expense of which a defendant has no recourse, coupled with the expense of reproduction of trial transcripts and records for appeal, render it incongruous to say that denial of a motion to dismiss, involving matters in bar of the indictment and a plain deficiency in an indictment which could not sustain conviction, is not a "final decision"; and this Court, in the exercise of its supervisory powers, should determine whether in this unusual case the court of appeals below erred in dismissing the appeal, for want of a "final decision".

A.

It is submitted that the issues presented to the Courts below and ruled upon are, with two exceptions, adequately presented by the printed motion to dismiss the indictment and the brief in support thereof filed in the District Court and contained in this record.

The two exceptions are:

(a) That upon its face the indictment does not have attached thereto a true and correct copy of the individual income tax return charged as filed by the defendant, because it is obvious from the appearance of the photostatic copies attached to each count of the indictment that the W-2 Forms prescribed by law and required to be attached to said income tax forms upon filing are not reproduced as attached thereto and apparently have been detached. Failure to submit this Form W-2 to the "Special" Grand Jury would constitute obvious prejudice to the defendant since it is a document furnished by his employer stating his salary and amounts of tax withheld and paid to the United States in behalf of the employee as required by law. In the case at bar this statement of Premium Beer Sales, Inc., undoubtedly would have allayed any concern by the "Special" Grand Jury as to whether the taxpayer-defendant was an employee and paid by the corporation mentioned.

(b) That predicating a prosecution upon a statute substantially different from the perjury statute, Section 1621, Title 18, U. S. C., deprives a defendant of due process of law where the prosecution is based upon an alleged false or erroneous statement that the signer declares under the *penalties of*

> *perjury* that it and appendages are to the best of his knowledge and belief true, correct and complete, deprives the defendant of due process of law in that it fails to notify him appropriately of the penalty for his conduct, and is confusing and inaccurate since the mode of trial under the charge of perjury is substantially different and the degree of proof required is substantially greater in perjury prosecutions than other sections of criminal law.

There are two principal classes of objections made to the indictment in the case at bar. First, that the indictment was improvidently and illegally returned by an unlawfully empaneled body described as a "Special" Grand Jury, and that before this "Special" Grand Jury unauthorized persons appeared, that is, so-called Special Prosecutors Ogilvie and Caret, it being contended that their claimed power of authority under the letter purporting to be from a Deputy Attorney General is so vague, broad and general, as to be violative of Section 310, Title 5, U. S. C., its purported base. (Gov. Exs. 1 and 2.)

It is next contended that the indictment is invalid because the "Special" Grand Jury was prejudiced and biased against the defendant by the manner of its empanelment, instruction by the District Court, conduct by the Special Prosecutors, widespread unfavorable and prejudicial publicity in the form of newspaper articles, broadcasts, etc., and by the obvious exclusion from the "Special" Grand Jury's consideration of substantial evidence which would have demonstrated the falsity of the charge that the defendant did not believe his return to be true, and the submission to the "Special" Grand Jury of witnesses and matters not calculated to establish or disprove the charge claimed to be under investigation, but calculated to preju-

dice this defendant in the eyes of the "Special" Grand Jury, such as the calling of the defendant before the "Special" Grand Jury as a witness about a year and three months before indictment, failing to interrogate him concerning the matters in issue in the indictment, and failing to recall him for such purpose although he was denied excuse from continued obedience to the subpoena.

It was further urged in the motion to dismiss, as a bar to the indictment, that the procedure by which the indictment was procured and returned was arbitrary and discriminatory in that it was contrary to the established, lawful and hitherto uniform practice, procedure and policy of the United States by its Departments, the Internal Revenue Service and the Department of Justice, to afford an opportunity for explanation, compromise and adjustment in the matters and things set forth in the indictment, and that although the income tax laws have been in effect since 1913, no comparable indictment has been disclosed, and for these reasons the defendant has been deprived substantive due process of law; and that this was accomplished by a prejudiced and biased presentation of the matters involved to a "Special" Grand Jury.

The prejudice and bias of the "Special" Grand Jury is established by:

(a) The propaganda of the "Special" Grand Jury by publicity regarding its empanelment and purpose and the direction of it by newspaper publicity to the defendant.

(b) The instruction of the District Court which empaneled the "Special" Grand Jury wherein the "Special" Grand Jury was told that it was *special* and empaneled for a *special* purpose to cooperate with *special* prosecutors.

(c) The appearance of Accardo as the first witness before the "Special" Grand Jury as predicted by newspaper articles of January 27, 1959.

(d) The failure to inquire of Accardo on his Grand Jury appearance the things and matters involved in the indictment.

(e) The failure to recall Accardo for an explanation of the comparatively petty deduction involved in the indictment, although he was not excused as a witness throughout the Term of the "Special" Grand Jury.

(f) The complete failure of all administrative and law enforcement bodies to afford Accardo an opportunity for explanation of the deductions involved in the three counts of the indictment, or to permit adjustment thereof.

(g) The failure of the United States through either of its tax administrative and enforcement bodies, Treasury or Justice, to afford an opportunity to Accardo to compromise anything or matter involved in the indictment. The concealment of the contemplated action by the Special Prosecutors, and the prejudiced and biased "Special" Grand Jury, and investigators associated with them, so that the ordinary forms and practices of discussion and adjustment of tax disagreements could occur; and so that Section 7122 of Title 26, U. S. C., would be completely frustrated and aborted in a manner prejudicial to the defendant by reason of his indictment and the attended disadvantages accruing therefrom, and prejudicial to the United States in that it worked to prevent and avoid collection of any claimed tax deficiency if, in fact, such a deficiency exists.

(h) The prejudice and bias of the "Special" Grand Jury is further demonstrated by the fact that Accardo, although a witness before the "Special" Grand Jury by agreement rather than by compulsory process and who was under agreement to appear before the "Special" Grand Jury on telephone call at any time, was, in the instant case, the subject of a suppressed indictment with bail fixed at $25,000.00, and his arrest was accomplished at an early morning hour at his residence in a suburb of Chicago with the accompaniment of reporters, photographers and resulting headlines in the Chicago daily papers. The fixing of bail and the suppression of the indictment at the request of the "Special" Grand Jury could only have been accomplished through prejudicial misrepresentations concerning the defendant and his willingness and ability to respond to process.

(i) The prejudice and bias of the "Special" Grand Jury is further demonstrated by the fact that in 18 months, that is from January 26, 1959, to July 26, 1960, the date of its expiration by law, it returned only two indictments, to-wit, the one at bar, and that of a recalcitrant witness since deceased.

(j) The prejudice and bias of the "Special" Grand Jury is further demonstrated by the inclusion in each count of the indictment of the entire income tax return of the defendant and his wife (except for Copy B Forms W-2 filed by the taxpayer as attachments and schedules in support of his return, and required by law as part of the return). This attachment of the income tax return was unnecessary to the charge and was for the malicious purpose of exposing to publicity a reproduction in the public press the income tax return of the

defendant in violation of Section 7213, Title 26, U. S. C., and Section 1905, Title 18, U. S. C. This obviously unlawful publication by officers of the United States through the misuse of the "Special" Grand Jury was an obvious violation of the rights of the defendant and of his wife, and his four dependent children, as well as other persons and business organizations therein mentioned other than Premium Beer Sales, Inc.

(k) The prejudice and bias of the "Special" Grand Jury is further demonstrated by the obvious "specialization" upon Accardo under the guise of a special investigation into organized crime of every kind and description as prescribed by the so-called letters of authority to Ogilvie and Carey, which activity resulted in this unprecedented legally insufficient indictment, each count of which contains an obviously false statement, since the attached copies of the income tax return are not true and correct copies of the returns as filed by the defendant as a taxpayer.

It is submitted that the trial Court's denial of the pleas in bar as expressed by the motion to dismiss were "final decisions" from which appeal will lie. To contend that the Court of Appeals and the Supreme Court are without power to exercise supervision of lower Court proceedings in so flagrant a case as the one at bar is tantamount to holding that they have no such supervisory power. It is submitted that the motion, the argument thereon, and the evidence heard in connection therewith amply demonstrate that this indictment is barred because illegally obtained, and because illegally returned by an improper body not provided for by law, which was biased and prejudiced against the specific defendant, and was aided and attended in this by appearance before it of unauthorized "Special" prosecutors.

B.

It is respectfully submitted that the trial Court order quashing the subpoenas duces tecum addressed to R. Tieken, United States Attorney for the Northern District of Illinois, and Joseph B. King, Assistant Regional Counsel, Bureau of Internal Revenue, upon a mere oral statement by an Assistant United States Attorney, and without any appropriate claim of privilege as prescribed by *United States* v. *Reynolds*, 345 U. S. 1, at page 7, constituted a denial of compulsory process for evidence in violation of the Sixth Amendment to the Constitution. This was a final decision in this matter. (Tr. 35.)

C.

It is admitted that in an ordinary case and, in fact, in most of the unusual cases, the denial of a motion for dismissal of an indictment for defects and legal deficiencies, is not sufficient ground to avoid being put to trial.

However, it is submitted that in the case at bar, there is such an unusual and clear violation of the rights of the defendant under the Sixth Amendment and the Rules of Criminal Procedure, that the ensuing trial and its great hardship and expense upon both the United States and the defendant require the exercise of review of the final decision of the District Court below in the plain interest of justice.

It is respectfully and seriously submitted that the case at bar is an extraordinary and unusual case which requires that this reviewing Court determine now whether the Court below did not lose jurisdiction, if ever obtained, by reason of the failure to charge the defendant with any crime in a lawful and constitutional manner.

Rule 7(c) of the Federal Rules of Criminal Procedure provides:

"The indictment or the information shall be a plain,

concise and definite written statement of the essential facts constituting the offense charged."

The Sixth Amendment to the Constitution of the United States prescribes the right of the defendant "to be informed of the nature and cause of the accusation"; (and to have compulsory process for obtaining witnesses in his favor).

Of course, constitutional guarantees are absolute. While some may hold certain rights and guarantees to be preferred, in the absence of expression in the Constitution, it is urged that these constitutional rights have equal standing. An accused deprived of these guarantees cannot properly be tried and if he is tried and convicted, the trial and conviction are void. The Supreme Court has ruled clearly that any Court which deprives an accused of his rights under the Sixth Amendment, loses jurisdiction.

This conclusion was reached in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). In that case, the accused was deprived of his right to the assistance of counsel, another right guaranteed by the Sixth Amendment. The Court said (at pp. 467-468):

> "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal Court's authority to deprive the accused of his life or liberty. * * * If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty. A Court's jurisdiction at the beginning of a trial may be lost 'in the course of the proceedings' due to failure to complete the Court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel. * * * *If this requirement of*

> *the Sixth Amendment is not complied with the Court no longer* has jurisdiction to proceed." (Emphasis supplied.)

That a Court loses jurisdiction over an accused when it deprives him of any rights guaranteed by the Sixth Amendment is also clear from *Pugh* v. *United States*, 9 Cir., 212 F. 2d 761, 764:

> "Under familiar rules, a district court of the United States may lose jurisdiction if and when it denies an accused person rights which he has under the Constitution. *Johnson* v. *Zerbst*, 304 U. S. 458."

See also *Bayless* v. *Johnston, Warden*, 48 F. Supp. 758, 760 (N. D. Cal. 1943).

In *Sutton* v. *United States*, 5 Cir., 157 F. 2d 661, 663, the Court held that the Sixth Amendment means that the defendant "shall be so fully and clearly informed of the charge against him as not only to enable him to prepare his defense and not be taken by surprise at the trial, but also that the information as to the alleged offense shall be so definite and certain that he may be protected by pleas of former jeopardy against another prosecution for the same offense." The Court observed at page 670:

> "In fact, there can be no more substantial error committed against a defendant than the denial of his constitutional rights under the Sixth Amendment. For such an error it was held in *Johnson* v. *Zerbst*, 304 U. S. 458, that the court lost jurisdiction of the case."

Each of the provisions of the Sixth Amendment is of equal stature. If comparisons are proper and a choice be forced, then indeed information as to the "nature and cause of the accusation" is probably more important than the "assistance of counsel". A defendant may, in some cases, be sufficiently articulate to make his own defense, but the most able counsel cannot effectively aid his client

where the prosecution is for "what no one can say with certainty." *Sutton* v. *U. S.*, *supra*.

In his Almanac of Liberty, Doubleday & Co. (1954), Justice Douglas asserts (p. 148):

> "To be held in custody without any charge is revolting in our sense of justice. Convicting a man of vagrancy because he is a communist or convicting him of tax evasion because he is a racketeer is bad enough. But bringing him to trial without disclosure of the precise accusation would be ever worse. *For it would in effect often be a denial of an opportunity to defend.*" (Emphasis supplied.)

What are the patent defects which the defendant contends has caused the District Court to lose jurisdiction to try him? Principal among them are:

(a) The indictment is duplicitous and multifarious. Section *7206(1)* of Title 26 proscribes the *making* and *subscribing* of a document containing a written declaration that it is made under the penalties of perjury and which the defendant *does not believe* to be true and correct as to every material matter. Section *7207* of Title 26, makes criminal the act of *delivering or disclosing* any return *known* by the person who delivers it or discloses it to be fraudulent or false as to any material matter. The first mentioned section provides for a fine of $5,000 and imprisonment up to three years, while Section 7207 is a misdemeanor providing for a fine up to $1000 and imprisonment up to a year, or both.

The indictment in the case at bar purports to make a charge under Section 7206(1) by reference in its title and conclusion, and states that the defendant did violate such a statute in the generic terms and language of the statute, by saying that the defendant did make and subscribe a document which he did not *believe* to be true and correct as

to every material matter; and then the indictment states that on or about a stated date the defendant made, subscribed *and* filed an individual income tax return, a true and correct copy of which is attached, in which the defendant made statements concerning his employment, his compensation, and his use of an automobile in promoting beer sales for the Premium Beer Sales, Inc. However, at this point, it is charged that the defendant *well knew* that *this* statement was not true and correct. "Well knew that this statement was not true and correct" is the language of Section 7207, Title 26, U. S. C., which proscribes the filing (delivers or discloses) of any return *known* to be fraudulent or false as to any material matter.

Can it be considered other than that this indictment is duplicitous and does not inform the defendant (or the judge and jury) of the nature and cause of the accusation?

Rule 8 of the Federal Rules of Criminal Procedure provides that two or more offenses may be charged in the same indictment or information *in a separate count for each offense*. Clearly, each count of the indictment in the case at bar, charges both making and subscribing *and* filing the original income tax return. The statutes which purport and are relied upon by the prosecutor provide different punishments for these separate acts, one of which is punished as a felony, and the other as a misdemeanor.

Does the indictment intend that the defendant shall meet a charge that he was not employed by Premium Beer Sales, Inc.? Is it charged that he falsified when he said he was employed in promoting beer sales, or is it a mere charge that he erred in his statement that 80 percent of the expense on a certain automobile was incurred by him in his employment, and is this a mere error of percentage, or is it claimed that he did not use the automobile in promoting beer sales for Premium Beer Sales, Inc.?

It is respectfully submitted that the indictment in this case, and each count thereof, so flagrantly violates the Rules of Criminal Procedure by incorporation of more than one charge in each offense and by resort to vagueness and uncertainty in a degree that constitutes concealment of the nature and cause of the accusation, that the Court below holds the defendant bound by bail for a trial which will consume many weeks in a cause where there is no competent or valid charge.

That this is a very unusual case, there can be no doubt. The prosecution was instituted by "Special" prosecutors; the charge made by a "Special" grand jury; the investigation, conducted for sixteen months, singularly culminated in a charge against one defendant under a very unusual statute, so rarely used that it has not been clearly interpreted as applying to income tax cases. This lone defendant was the first witness before the "Special" grand jury, and was not interrogated concerning the matters now complained of, by the prosecutors or grand jurors then, or any other officer, before or since.

Mr. Justice Jackson, in concurrence with Mr. Justice Frankfurter, distinguished *judgment* from *decision*, as used in 28 U. S. C. 1291. Indicating the propriety of holding appeal to be a statutory right, they said:

> "* * * While only a sentence constitutes a final *judgment* in a criminal case, *Berman* v. *United States*, 302 U. S. 211, 212, 58 S. Ct. 164, 165, 82 L. Ed. 204, it is a final *decision* that Congress has made reviewable. 28 U. S. C. § 1291, 28 U. S. C. A. § 1291. While a final judgment always is a final decision there are instances in which a final decision is not a final judgment." *Stack* v. *Boyle*, 342 U. S. 1, 12.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANFORD CLINTON,
134 North LaSalle Street,
Chicago 2, Illinois,

MAURICE J. WALSH,
105 West Adams Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

August 25, 1960.

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Win G. Knoch, Circuit Judge.
Hon. Latham Castle, Circuit Judge.

United States of America,
Plaintiff-Appellee.

No. 13103 *vs.*

Anthony J. Accardo,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This matter coming on to be heard on the motion of the United States of America to dismiss this appeal, and on the answer of Defendant-Appellant to said motion;

It is ordered by this Court that the motion to dismiss this appeal be, and the same is hereby granted, on the ground that this court has no jurisdiction because the order from which this appeal is taken is not a final and appealable order.

FILE COPY

Supreme Court, U.S.
FILED
SEP 30 1960
JAMES R. BROWNING, Clerk

No. 408

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANTHONY JOSEPH ACCARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 408

ANTHONY JOSEPH ACCARDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 25, 1960, a three-count indictment was returned against petitioner in the United States District Court for the Northern District of Illinois, charging him with having made, subscribed and filed federal income tax returns "containing misstatements regarding his automobile expense deductions", in violation of Section 7206(1) of the Internal Revenue Code of 1954. (Pet. 4, 21.) Petitioner moved to dismiss the indictment, arguing that it is fatally vague, uncertain, duplicitous, and contains a false allegation. He also served subpoenas *duces tecum* upon the United States Attorney and an official of the Internal Revenue Service, calling for documents intended for use as evidence in support of the motion to dismiss. (Pet. 3.) The

District Court, after hearing extensive oral arguments, quashed the subpoenas and denied the motion to dismiss the indictment. Petitioner's appeal to the Seventh Circuit was denied, without opinion, for lack of jurisdiction "because the order from which this appeal is taken is not a final and appealable order." (Pet. 25.)

The ruling below is clearly correct. 28 U.S.C. 1291; *Berman* v. *United States*, 302 U.S. 211, 212–13; *Cobbledick* v. *United States*, 309 U.S. 323. Petitioner concedes (Pet. 18) that denial of a motion to dismiss an indictment is not a final order, but contends that his case is so "extraordinary and unusual" (Pet. 18) that an exception should be made. Even if "extraordinary and unusual" circumstances could justify an exception to the rule, they are certainly not present here.

The petition for certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

SEPTEMBER
~~OCTOBER~~ 1960.